

R.C.M. 405(j)(2)(I)

charges be preferred. *See* R.C.M. 306 and 401 concerning other possible dispositions.

See Appendix 5 for a sample of the Investigating Officer's Report (DD Form 457).

(3) *Distribution of the report.* The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) *Objections.* Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charges or taking other action within the 5-day period.

(k) *Waiver.* The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

Discussion

See also R.C.M. 905(b)(1); 906(b)(3).

If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver.

The commander who receives an objection may direct that the investigation be reopened or take other action, as appropriate.

Even if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review.

Rule 406. Pretrial advice

(a) *In general.* Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

Discussion

A pretrial advice need not be prepared in cases referred to special or summary courts-martial. A convening authority may, however, seek the advice of a lawyer before referring charges to such a court-martial. When charges have been withdrawn from a general court-martial (*see* R.C.M. 604) or when a mistrial has

been declared in a general court-martial (*see* R.C.M. 915), supplementary advice is necessary before the charges may be referred to another general court-martial.

The staff judge advocate may make changes in the charges and specifications in accordance with R.C.M. 603.

(b) *Contents.* The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

(1) Conclusion with respect to whether each specification alleges an offense under the code;

(2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report);

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(4) Recommendation of the action to be taken by the convening authority.

Discussion

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and indorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. However, there is no legal requirement to include such information and failure to do so is not error.

Whatever matters are included in the advice, whether or not they are required, should be accurate. Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. *See* R.C.M. 905(b)(1); 906(b)(3).

The standard of proof to be applied in R.C.M. 406(b)(2) is probable cause. *See* R.C.M. 601(d)(1). Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. *See* R.C.M. 905(b)(1) and its Discussion.

(c) *Distribution.* A copy of the advice of the staff

judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.

Rule 407. Action by commander exercising general court-martial jurisdiction

(a) *Disposition.* When in receipt of charges, a commander exercising general court-martial jurisdiction may:

- (1) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges and the effect of dismissing charges.

- (2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate.

A subordinate commander may not be required to take any specific action or to dispose of charges. See R.C.M. 104. See also paragraph 1d(2) of Part V. When appropriate, charges may be sent or returned to a subordinate commander for compliance with procedural requirements. See, for example, R.C.M. 303 (preliminary inquiry); R.C.M. 308 (notification to accused of charges).

- (3) Forward any charges to a superior commander for disposition;

Discussion

See R.C.M. 401 (c)(2)(A) for guidance concerning forwarding charges to a superior.

- (4) Refer charges to a summary court-martial or a special court-martial for trial;

Discussion

See R.C.M. 601; 1302(c).

- (5) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, after which additional action under this rule may be taken;

Discussion

An investigation should be directed when it appears the charges are of such a serious nature that trial by general court-martial may be warranted. See R.C.M. 405. If an investigation of the subject matter already has been conducted. See R.C.M. 405(b).

- (6) Subject to R.C.M. 601(d), refer charges to a general court-martial.

Discussion

See Article 22 and R.C.M. 504(b)(1) concerning who may exercise general court-martial jurisdiction.

See R.C.M. 601 concerning referral of charges. See R.C.M. 306 and 401 concerning other dispositions.

(b) *National security matters.* When in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be inimical to the prosecution of a war or harmful to national security, that commander, unless otherwise prescribed by regulations of the Secretary concerned, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may dismiss the charges, authorize trial of them, or forward them to a superior authority.

Discussion

In time of war, charges may be forwarded to the Secretary concerned for disposition under Article 43(e). Under Article 43(e), the Secretary may take action suspending the statute of limitations in time of war.